IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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Supreme Court, U. S.
FILED
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NO. 78-1588

CAROL VANCE, ET AL.,

Appellants,

V.

UNIVERSAL AMUSEMENT CO., INC., ET AL.,

Appellees.

GEORGE E. McCREA, ET AL.,

Appellants,

V.

KING ARTS THEATRE, INC.,

Appellees.

* * *

On Appeal From The United States Court of Appeals For The Fifth Circuit

* * *

BRIEF FOR THE APPELLANTS

* * *

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BRIEF FOR THE APPELLANTS

* * *

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Fifth Circuit (Jurisdictional Statement Appendix I) is reported at 559 F.2d 1286. On rehearing en banc, the Court in its opinion entered on December 18, 1978, held that Article 4667(a)(3), Vernon's Texas Civil Statutes was unconstitutional, (Jurisdictional Statement Appendix II) the opinion being reported at 587 F.2d 159. Eight judges voted with the majority

opinion and six judges dissented. The opinion of the District Court is reported at 404 F. Supp. 33.

JURISDICTION

Notice of Appeal was filed on January 15, 1979, and on March 9, 1979, Mr. Justice Powell extended the time in which to docket an appeal to and including April 17, 1979. The appeal was timely docketed, and probable jurisdiction was noted on June 11, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1254(2).

QUESTION PRESENTED

Whether the Texas nuisance statute (Article 4667(a)(3), Vernon's Texas Civil Statutes) is unconstitutional for the reason that it acts as a prior restraint on the exercise of rights guaranteed by the First Amendment of the Constitution of the United States.

STATUTE INVOLVED

The Texas nuisance statute, Article 4667, Vernon's Texas Civil Statutes, reads in pertinent part as follows:

> Injunctions to abate public nuisances
>
> (a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the state or any citizen thereof:
>
> (1) . . . .
>
> (2) . . . .
>
> (3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;

Article 4666, Vernon's Texas Civil Statutes is not involved in the appeal by Appellants Vance and McCrea. This Article permits the mandatory closing of premises in certain nuisance situations; however, this provision was never applied by these Appellants, was not a part of their appeal to the Court of Appeals and the ruling of the Court of Appeals (majority opinion)--that the closing provisions are unconstitutional as applied to motion picture houses or bookstores--is not questioned by these Appellants in this Court.

STATEMENT OF THE CASE

Proceedings Below

Twenty cases involving the question presented by the appeal as well as other questions were consolidated before a three-judge court. That court determined that Article 4667(a)(3) was unconstitutional, the opinion being reported at 404 F. Supp. 33, and an appeal was made to the United States Court of Appeals with the results described above.

A concurrent appeal to the Court of Appeals was made by Ted Butler, Bexar County District Attorney, and Emil Peters, City Attorney of the City of San Antonio, Texas. The appeal involved in part Article 4667(a)(3) but, in the main, concerned other statutes of the State of Texas. The Court of Appeals ruled against these parties in *Dexter v. Butler*, 559 F.2d 1287 (1977), 587 F.2d 176 (1978) and application for a writ of certiorari was made to this Court. Certiorari was denied on June 11, 1979.

The Injunctive Process Under Article 4667

No injunction prohibiting the dissemination of obscene materials was entered in the Fifth Circuit titular case, *King Arts Theatre, Inc. v. McCrea.* The lead case, *Universal Amusement Company, Inc. v. Vance*, the original case before the three-judge district court, was

settled and became merely the vehicle for the appeal to the Court of Appeals for all consolidated cases except for *Dexter v. Butler*, wherein a separate appeal was taken both to court below and to this Court.

However, in some of the other consolidated cases a state court injunction was issued. In the case of *State v. Stambaugh*, No. 216,943 in the 126th Judicial District Court of Texas, an injunction enjoined the manager of an Austin bookstore and movie arcade from using the premises to disseminate obscene materials. That state case and injunction was questioned in *San Antonio Book Mart, Inc., d/b/a Austin Book Mart v. Smith, et al.*, a cause filed in the United States District Court for the Western District of Texas, Austin Division, and one of the cases consolidated with *Universal* in the three-judge district court. A copy of the injunction is attached as Appendix III to the Jurisdictional Statement to illustrate the kind of injunction entered pursuant to Article 4667(a)(3). The injunction is drawn in accordance with the Texas law in this sensitive area of prior restraint which in turn follows the law of this Court in determining the validity of such restraint. See *Moore v. Texas*, 470 S.W.2d 391 (Tex. Civ. App. - San Antonio 1971); *Richards v. Texas*, 497 S.W.2d 770 (Tex. Civ. App. - Beaumont 1973); and *Locke v. State*, 516 S.W.2d 949 (Tex. Civ. App. - Texarkana 1974).

In *State v. Stambaugh*, No. 216,943 in the 126th Judicial District of Texas (Jurisdictional Statement Appendix III), the injunction comports with the obscenity standards of *Miller v. California*, 313 U.S. 15 (1973), adopted by Texas in *State v. West*, 489 S.W.2d 597 (Tex. Crim. App. 1973). In essence, the Article 4667(a)(3) injunction enjoins only films, books and magazines wich depict:

(1) Sexual intercourse.

(2) Oral and anal sodomy, and

(3) Bestiality

and which further:

(1) Have a dominant theme which taken as a whole appeals to the prurient interest in sex, nudity or excretion,

(2) Portray sexual conduct in a patently offensive manner, and

(3) Do not have, when taken as a whole, any serious literary, artistic, political or scientific value.

Moreover, notice should be taken that the judge in his order issued in *State v. Stambaugh, supra* indicated his refusal to enter a temporary restraining order without notice and hearing in an obscenity-oriented injunction proceeding.

An injunction in the form entered above, as required by Texas law and the decisions of this Court, presents a dubious tool for the control of obscenity. Under Texas law, the complainant must prove, after notice to a claimed violator of the injunction, all of the terms of the injunction: a depiction of sexual intercourse, sodomy or bestiality *plus* the *Miller v. California* requirements, prurient interest, patent offensiveness and lack of literary, artistic, political or scientific value. See Rule 692, Texas Rules of Civil Procedure, which provides:

> Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. In case of such disobedience, the complainant, his agent or attorney, may file in the court in which such injunction is pending or with the judge in vacation, his affidavit stating what person is guilty of such disobedience and describing the acts constituting the same; and thereupon the

> court or judge shall cause to be issued an attachment for such person, . . . or said court or judge may issue a show cause order, directing and requiring such person to appear on such date as may be designated and show cause why he should not be adjudged in contempt of court. On return of such attachment or show cause order, the *judge shall proceed to hear proof; and if satisfied that such person has disobeyed the injunction*, either directly or indirectly, may commit such person to jail without bail until he purges himself of such contempt, ... [Emphasis supplied]

And see *Locke v. State, supra*, wherein the Court observed, in considering a possible contempt hearing for the showing of obscenity, that:

> . . . the State will have the burden to prove that the exhibition comes within the narrow limits of the injunction. Under these circumstances there appears to be no danger that protected matter will be suppressed or that the appellant will have any doubt about the legality of his future conduct.

Thus, each alleged violation of an injunction must be shown by proof by the complainant, and the violator need only purge himself of contempt by agreeing not to exhibit or sell the offending material.

Accordingly, the injunction is not an imposing weapon with which to combat obscenity. However, the efficacy of the injunction as opposed to criminal statutes for obscenity control, is not in question in this case, but the very cumbersomeness and the ineffectualness of the injunction process illuminates the basic issue and its answer: an Article 4667(a)(3) injunction does not prohibit the dissemination of possible First Amendment material any more than do the Texas

criminal statutes, and probably less and such an injunction does not, therefore, constitute impermissible prior restraint.

ARGUMENT

1. Article 4667(a)(3) as Applied is Constitutional Under The Holdings Of This Court.

The majority opinion of the Court of Appeals finds fault with the temporary injunction procedures of Texas and finds that procedural safeguards are lacking, noting that the only test applied by a Texas court at a temporary injunction hearing is the showing of a "probable right" and a "probable injury." (Majority Opinion, 587 F.2d 170) The court then observes that on appeal from the temporary injunction the Appellant cannot argue that the suppressed material is not obscene. (587 F.2d 170) This interpretation overlooks the court's own earlier citations to *Moore v. Texas, supra*, and *Locke v. State, supra*, in which the appellate courts examined the validity of the temporary injunctions on appeal in terms of obscenity standards and not merely in the framework of "probable right" and "probable injury."

The Court of Appeals further overlooks the enforcement procedures of the Texas law which require proof of *Miller* standards at a contempt hearing. Thus, even if the majority opinion is correct with respect to the scope of appellate review, a contempt hearing will require the complainant to prove a full obscenity case, a situation no different than the filing of a criminal complaint and a resulting trial on the charge.

The majority opinion also ignores or misinterprets vital portions of the state court opinions in *Locke* and *Richards v. State, supra*, observing that the cases stand for the proposition that while an injunction cannot

merely prohibit the future showing of "obscene films," an injunction may validly enjoin the enhibition of "films portraying acts of sexual intercourse, deviate sexual intercourse and bestiality." The majority overlooks the portions of these opinions which also require that the foregoing acts generate the *Miller* requirements of (1) appeal to the prurient interest, (2) patent offensiveness and (3) the lack of redeeming social values.

The combination of enjoining the exhibition of films depicting specific acts, coupled with the requirement that such acts come within the *Miller* criteria, mandate the conclusion that a Texas court injunction against the showing of future obscenity is no more vague than any valid state or federal criminal statute prohibiting the dissemination of obscenity. Adding in the proof requirements of any contempt hearing, the obscenity injunction constitutes no greater prior restraint than any criminal statute.

2. While it is Questionable Whether Article 4667(a)(3) Imposes Prior Restraint, The Imposition of Prior Restraint is Constitutionally Permissible Under Appropriate Safeguards.

The majority opinion of the Court of Appeals holds:

> An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. . . . '[t]his is the essence of censorship.' (587 F.2d 169)

Apparently, the majority is condemning all prior restraint of possible First Amendment materials whatever the language of an injunction (or ordinance or statute) and regardless of the procedures required for proving violations of the injunction (or ordinance or statute).

This holding is not in accordance with the decisions of this Court which have recognized that prior restraint is permissible in certain situations. *Near v. Minnesota*, 283 U.S. 697 (1931); *Kingsley Books v. Brown*, 354 U.S. 436 (1957); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Time Film Corporation v. City of Chicago*, 365 U.S. 43 (1973); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546.

This Court observed in *Southeastern Promotions*, *supra*, that a system of prior restraint is permissible if:

> . . . it takes place under procedural safeguards designed to obviate the dangers of a censorship system. 420 U.S. at 559.

The procedural safeguards are present in the Texas injunctive process and Article 4667(a)(3), as applied, is constitutional.

CONCLUSION

For the reasons stated above, Appellants, the State of Texas, submit that Article 4667(a)(3), V.T.C.S., is constitutional on its face and in its application. Accordingly, the Appellants pray that the judgment of the Court of Appeals holding Article 4667(a)(3) to be unconstitutional, be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, hereby certify that two copies of the above and foregoing Brief of Appellants have been served by placing same in the United States mail, postage prepaid, certified, on this the ___ day of August 1979, to each of the following: Frierson M. Graves, Jr., 2020 First Tennessee Building, Memphis, Tennessee 38103; and Gerald Goldstein, 2900 Tower Life Building, San Antonio, Texas 78205.

_____
LONNY F. ZWIENER